

REMARKS

Claims 1, 2, 4-8, and 10-14 are before the Examiner. Amendments to the Claims are shown based on Claims 1-14 of the corresponding issued U.S. Patent No. 6,300,439 ("US-439".)

In the instant response, Claim 1 has been three times amended to further clarify that the catalyst has an activity of at least 641 g polyethylene/mmol catalyst•atm•h as previously discussed in the RCE filed December 18, 2008. Support for this amendment may be found at Col. 16, lines 54-55 in Example 11. In addition, Claims 1, 2, 5, 6, and 8 have been amended as previously discussed in the RCE filed October 18, 2007. Claims 3 and 9 have been previously cancelled. Claims 1, 2, 4-8, and 10-14 remain in the instant application. No new matter has been added.

Applicant wishes to thank Examiner for removing the rejection of the instant claims under 35 U.S.C. §102(e) as being anticipated by Matsunaga.

Double Patenting

Claims 1, 2, 4-8, and 10-14 stand rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over Claims 1-38 of U.S. Patent No. 6,271,325 to McConville (hereinafter "McConville".) A Terminal Disclaimer in compliance with 37 CFR 1.321 is attached hereto. Accordingly, Applicant respectfully requests that the rejection on the ground of nonstatutory obviousness-type double patenting be removed.

Rejection under 35 U.S.C. §102

Claims 1, 2, 4-8, and 10-14 have been rejected under 35 U.S.C. § 102(e) as being anticipated by U.S. Patent No. 6,271,325 to McConville. Applicant respectfully disagrees.

The Action maintains the rejection of the presently claimed invention as anticipated by McConville. As discussed previously, Applicant's presently claimed invention recites *inter alia* a process for polymerization wherein the leaving group is an aryl substituted alkyl leaving group, and wherein the catalyst has an activity of 641 g polyethylene/mmol catalyst•atm•h. This activity is a 200% to 300% improvement. As Applicant discloses at

Col. 2, lines 40-51, the use of the recited leaving group results in an unexpected and non-obvious improvement in catalyst activity over the cited prior art. Furthermore, as Applicant has previously pointed out, McConville merely discloses that leaving group X is independently hydrogen, halogen or a hydrocarbyl group (see Claim 4), and that X is independently an anionic leaving group, preferably hydrogen, a hydrocarbyl group, a heteroatom or a halogen (see Col. 3, lines 14-16.) McConville fails to disclose or suggest Applicant's discovered improvement with the level of specificity which would enable one of skill in the art to achieve the productivity resultant from the limitation of the leaving group recited by Applicant.

It is well established that a generic formula which encompasses a vast number of compounds does not describe and thus anticipate all compounds embraced therein merely because they are within the scope of the formula. *In re Petering et al.* (CCPA 1962) 301 F.2d 676, 133 USPQ 275; *E.I. du Pont de Nemours & Co. v. Ladd, Comr. Pats., et al.* (CADC 1964) 328 F.2d 547, 140 USPQ 297. There can be no anticipation where the reference is so broad that the likelihood of arriving at the claimed composition would be the same as discovering the combination of a safe by an inspection of its dials, *Ex parte Garvey* (POBA 1939) 41 USPQ 583; *Ex parte Starr* (POBA 1938) 44 USPQ 545, nor is anticipation made out by a hindsight selection based on an applicant's disclosure of variables of a broad generic disclosure. *In re Ruschig et al.* (CCPA 1965) 343 F.2d 965, 145 USPQ 274.

The language of McConville uses to describe leaving group X (i.e., X is independently an anionic leaving group, preferably hydrogen, a hydrocarbyl group, a heteroatom or a halogen) includes literally millions of possible embodiments, limited only by the imagination of the artisan. This description encompasses literally every organic molecule ever produced, or which ever will be produced. This disclosure does not constitute "a description of a very limited class of compounds" (See *In re Petering*, 301 F.2d 676, 681 (CCPA 1962)) such that McConville would anticipate the presently claimed invention. On the contrary, in McConville the specification is "open-ended and literally discloses an undue number of compounds from which one skilled in the art must select in order to obtain" Applicant's presently claimed invention (see *Rene Heymes, et al., v. Takao Takaya, et al.*, (CAFC 1989) 867 F.2d 616, emphasis added.)

In contrast, Applicant recites a very specific limitation that X is an aryl substituted alkyl leaving group. Furthermore, to fall within Applicant's presently claimed invention, the Group 15 containing tridentate ligated metal catalyst compound must have an activity of at least 641 g polyethylene/mmol catalyst•atm•h, thus further limiting the presently claimed invention. Neither this limited leaving group, nor this level of activity is disclosed in McConville, and thus, McConville fails to disclose all of the recited limitations of Applicant's presently claimed invention. As such, McConville cannot reasonably be found to anticipate the presently claimed invention. Removal of the rejection is respectfully requested.

Applicant respectfully requests that all rejections be withdrawn and solicit a prompt notice of allowability. In the alternative, Applicant invites the Office to telephone the undersigned attorney if there are any other issues outstanding which have not been presented to the Office's satisfaction.

Respectfully submitted,

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Date

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